

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF WASHINGTON

SHANTELL S. NOBLE,

Plaintiff,

v.

CAROLYN W. COLVIN,  
Commissioner of Social Security,

Defendant.

No. CV-13-00113-JTR

ORDER GRANTING PLAINTIFF'S  
MOTION FOR SUMMARY  
JUDGMENT

**BEFORE THE COURT** are cross-Motions for Summary Judgment. ECF Nos. 19, 27. Attorney Dana C. Madsen represents Plaintiff, and Special Assistant United States Attorney Daphne Banay represents the Commissioner of Social Security (Defendant). The parties have consented to proceed before a magistrate judge. ECF No. 15. After reviewing the administrative record and the briefs filed by the parties, the court **GRANTS** Plaintiff's Motion for Summary Judgment and **DENIES** Defendant's Motion for Summary Judgment.

**JURISDICTION**

On September 15, 2005, Plaintiff filed a Title II application for a period of disability and disability insurance benefits, along with a Title XVI application for supplemental security income, alleging disability beginning September 15, 2004. Tr. 17; 127. Plaintiff reported that she was unable to work due to depression and post-traumatic stress disorder. Tr. 102. Plaintiff's claim was denied initially and on reconsideration, and she requested a hearing before an administrative law judge (ALJ). Tr. 32-78.

1 On January 23, 2008, ALJ Hayward C. Reed held a hearing. Tr. 394-435.  
2 On February 8, 2008, the ALJ issued a decision finding Plaintiff not disabled. Tr.  
3 17-29. The Appeals Council declined review, and after Plaintiff filed a petition in  
4 District Court, the parties stipulated to a remand. Tr. 509-13. Subsequently, the  
5 Appeals Council issued a remand order that vacated the February 8, 2008 decision.  
6 Tr. 516-17.

7 ALJ R.J. Payne held a second hearing on March 19, 2010. Tr. 805-31. On  
8 April 8, 2010, the ALJ issued an opinion finding Plaintiff was not disabled. Tr.  
9 463-78. The Appeals Council again remanded the case for additional proceedings.  
10 Tr. 503-07.

11 The most recent hearing in this case was held on July 20, 2011, at which  
12 vocational expert Deborah LaPoint, and Plaintiff, who was represented by counsel,  
13 testified. Tr. 792-804. ALJ R.J. Payne presided. Tr. 792. Subsequently, the ALJ  
14 denied benefits on August 12, 2011. Tr. 450-59. The ALJ noted that the Appeals  
15 Council “did not expressly vacate the prior unfavorable Administrative Law Judge  
16 decision, but remanded it for supplemental vocational expert information.” Tr.  
17 450. Additionally, the ALJ incorporated the prior opinion’s findings and  
18 conclusions: “The claimant’s medical history, as set forth in the prior unfavorable  
19 Administrative Law Judge decision is incorporated herewith for purposes of setting  
20 forth the facts contained therein, including the conclusions derived therefrom.”  
21 Tr. 453. The Appeals Council declined review. Tr. 4-7. The instant matter is  
22 before this court pursuant to 42 U.S.C. § 405(g).

### 23 **STATEMENT OF FACTS**

24 The facts have been presented in the administrative hearing transcript, the  
25 ALJ’s decision, and the briefs of the parties and, thus, they are only briefly  
26 summarized here. At the time of the third hearing, Plaintiff was 34 years old,  
27 single and lived with her four-year old child and a roommate. Tr. 817. She  
28 completed high school, and trained at Apollo College for nine months to become a

1 medical administrative assistant. Tr. 818.

2 Plaintiff testified that she has worked as a cashier at a grocery store and at  
3 Walmart, as a caregiver, and she has stocked shelves. Tr. 819-20. Plaintiff said  
4 she quit her last job because it was hard and very stressful. Tr. 820. Plaintiff  
5 testified that every day she feels tired, sad and angry, and she sleeps poorly at  
6 night. Tr. 821-22. Plaintiff also testified that her roommate and her mother help  
7 care for her child. Tr. 824.

8 Plaintiff said she shops with her mother or her roommate because she gets  
9 panicky if she goes alone, and she does not leave home very often. Tr. 825. She  
10 likes watching television. Tr. 830. Plaintiff said she has problems with her back,  
11 and she estimated that she can sit for up to an hour and one half, and the amount of  
12 time she can stand varies. Tr. 826. She said she cannot walk very much because  
13 she does not have the energy for it, and she can lift about 20 pounds. Tr. 827.  
14 Plaintiff said she was unable to work because she could not handle being “out  
15 there” and with people. Tr. 827.

## 16 STANDARD OF REVIEW

17 The ALJ is responsible for determining credibility, resolving conflicts in  
18 medical testimony, and resolving ambiguities. *Andrews v. Shalala*, 53 F.3d 1035,  
19 1039 (9th Cir. 1995). The ALJ’s determinations of law are reviewed *de novo*,  
20 although deference is owed to a reasonable construction of the applicable statutes.  
21 *McNatt v. Apfel*, 201 F.3d 1084, 1087 (9th Cir. 2000). The decision of the ALJ  
22 may be reversed only if it is not supported by substantial evidence or if it is based  
23 on legal error. *Tackett v. Apfel*, 180 F.3d 1094, 1097 (9th Cir. 1999). Substantial  
24 evidence is defined as being more than a mere scintilla, but less than a  
25 preponderance. *Id.* at 1098. Put another way, substantial evidence is such relevant  
26 evidence as a reasonable mind might accept as adequate to support a conclusion.  
27 *Richardson v. Perales*, 402 U.S. 389, 401 (1971). If the evidence is susceptible to  
28 more than one rational interpretation, the court may not substitute its judgment for

1 that of the ALJ. *Tackett*, 180 F.3d at 1097; *Morgan v. Commissioner of Social Sec.*  
 2 *Admin.*, 169 F.3d 595, 599 (9th Cir. 1999). Nevertheless, a decision supported by  
 3 substantial evidence will still be set aside if the proper legal standards were not  
 4 applied in weighing the evidence and making the decision. *Browner v. Secretary*  
 5 *of Health and Human Services*, 839 F.2d 432, 433 (9th Cir. 1988). If substantial  
 6 evidence exists to support the administrative findings, or if conflicting evidence  
 7 exists that will support a finding of either disability or non-disability, the ALJ's  
 8 determination is conclusive. *Sprague v. Bowen*, 812 F.2d 1226, 1229-1230 (9th  
 9 Cir. 1987).

### 10 SEQUENTIAL PROCESS

11 The Commissioner has established a five-step sequential evaluation process  
 12 for determining whether a person is disabled. 20 C.F.R. §§ 404.1520(a),  
 13 416.920(a); see *Bowen v. Yuckert*, 482 U.S. 137, 140-42 (1987). In steps one  
 14 through four, the burden of proof rests upon the claimant to establish a prima facie  
 15 case of entitlement to disability benefits. *Tackett*, 180 F.3d at 1098-99. This  
 16 burden is met once a claimant establishes that a physical or mental impairment  
 17 prevents him from engaging in his previous occupation. 20 C.F.R. §§  
 18 404.1520(a)(4), 416.920(a)(4). If a claimant cannot do his past relevant work, the  
 19 ALJ proceeds to step five, and the burden shifts to the Commissioner to show that  
 20 (1) the claimant can make an adjustment to other work; and (2) specific jobs exist  
 21 in the national economy which claimant can perform. *Batson v. Commissioner of*  
 22 *Social Sec. Admin.*, 359 F.3d 1190, 1193-94 (2004). If a claimant cannot make an  
 23 adjustment to other work in the national economy, a finding of "disabled" is made.  
 24 20 C.F.R. §§ 404.1520(a)(4)(I-v), 416.920(a)(4)(I-v).

### 25 ALJ'S FINDINGS

26 At step one of the sequential evaluation process, the ALJ found Plaintiff has  
 27 not engaged in substantial gainful activity since September 15, 2004, her alleged  
 28 onset date. Tr. 452. At step two, the ALJ found Plaintiff suffered from the severe

1 impairments of depressive disorder and personality disorder. Tr. 452. At step  
2 three, the ALJ found Plaintiff's impairments, alone and in combination, did not  
3 meet or medically equal one of the listed impairments. Tr. 453. The ALJ found  
4 that the Plaintiff was able to perform a full range of work at all exertional levels,  
5 but with non-exertional limitations:

6       The undersigned noted the claimant had the average ability to read,  
7       write and use numbers, but had either no limitations or, at times,  
8       moderate limitations in her ability to carry out detailed instructions.  
9       Moreover, she had moderate limitations in her ability to be in  
10      coordination or proximity to others without being distracted by them  
11      and moderate limitations when interacting with the public.  
12      Furthermore, she had moderate limitations in her ability to set realistic  
13      goals. Last, there was mental symptomology and she took prescribed  
14      medications for those symptoms. Yet, despite the effects of  
15      medications, she would be able to be reasonably attentive and  
16      responsive in a work setting or in her ability to carry out work  
17      assignments in a satisfactory manner.

18 Tr. 454. The ALJ found that Plaintiff is unable to perform past relevant work. Tr.  
19 456. The ALJ found that, considering Plaintiff's age, education, work experience  
20 and residual functional capacity, job existed in significant numbers in the national  
21 economy that Plaintiff could perform, such as housekeeping cleaner, janitor, or  
22 industrial cleaner. Tr. 457. As a result, the ALJ found that Plaintiff was not  
23 disabled. Tr. 459.

## 24 **ISSUES**

25       Plaintiff contends that the ALJ erred by improperly weighing the medical  
26 evidence. ECF No. 19 at 12-21.

## 27 **DISCUSSION**

28       In weighing medical source opinions in Social Security cases, the Ninth  
Circuit distinguishes among three types of physicians: (1) treating physicians, who  
actually treat the claimant; (2) examining physicians, who examine but do not treat

1 the claimant; and (3) non-examining physicians, who neither treat nor examine the  
2 claimant. *Lester v. Chater*, 81 F.3d 821, 830 (9th Cir. 1995). Generally, more  
3 weight should be given to the opinion of a treating physician than to the opinions  
4 of non-treating physicians. *Id.* A treating physician's opinion is afforded great  
5 weight because such physicians are "employed to cure and [have] a greater  
6 opportunity to observe and know the patient as an individual." *Sprague*, 812 F.2d  
7 at 1230. Where a treating physician's opinion is not contradicted by another  
8 physician, it may be rejected only for "clear and convincing" reasons, and where it  
9 is contradicted, it may not be rejected without "specific and legitimate reasons"  
10 supported by substantial evidence in the record. *Lester*, 81 F.3d at 830.

11 **A. Joyce Everhart, Ph.D.**

12 Plaintiff contends that the ALJ failed to properly reject the opinion of Dr.  
13 Everhart, and if her opinions are properly credited, Plaintiff is unable to sustain  
14 work. ECF No. 19 at 20-21.

15 On October 26, 2009, Dr. Everhart examined Plaintiff, and produced a  
16 narrative report and completed a Medical Source Statement of Ability to Do Work-  
17 Related Activities. Tr. 626-37. Dr. Everhart reviewed Plaintiff's medical records  
18 from 2004 through 2009. Tr. 626-28. Dr. Everhart also administered several  
19 objective medical tests. Tr. 630-33. Dr. Everhart noted that Plaintiff presented as  
20 mildly anxious and depressed. Tr. 633. She also noted that on the BDI-II, and  
21 BAI, Plaintiff's respective scores "appear[ed] to indicate an exaggeration of  
22 symptoms." Tr. 633. Additionally, Plaintiff's MMPI-2 revealed an invalid profile  
23 due to an elevated F scale. Tr. 634. Dr. Everhart noted Plaintiff was not compliant  
24 with her medication. Tr. 633. Dr. Everhart assessed Plaintiff with moderate  
25 limitations in her ability to understand and remember complex instructions, carry  
26 out complex instructions, make judgments on complex work-related decisions, and  
27 interact appropriately with supervisors and co-workers. Tr. 635-36.

28 The ALJ addressed Dr. Everhart's opinion in the previous April 8, 2010,

1 decision. Tr. 476. In that opinion, ALJ Payne noted that “this opinion is supported  
2 by substantial clinical testing,” but did not explicitly indicate the weight accorded  
3 to the opinion. Tr. 476. In the present opinion, the ALJ addressed Dr. Everhart’s  
4 opinion in the context of discussing the hypothetical posed to the vocational expert.  
5 Tr. 459. The ALJ noted the “vocational expert testified that considering Dr.  
6 Everhart’s limitations alone, the claimant may have difficulty retaining a job over  
7 time.” Tr. 459.<sup>1</sup> The ALJ concluded with respect to Dr. Everhart’s assessed  
8 limitations: “reviewing the evidence in its entirety including the new evidence, the  
9 undersigned found these limitations to be unsupported. They appeared to be  
10 considered in haste and the evidence does not support it.” Tr. 459.

11 The ALJ provided no examples, citation to the record, or specific  
12 explanation to support his conclusion that the new evidence failed to support the  
13 limitations, or that the assessments were “considered in haste.” Tr. 459. “Merely  
14 to state that a medical opinion is not supported by enough objective findings 'does  
15 not achieve the level of specificity our prior cases have required, even when the  
16 objective factors are listed seriatim.'" *Rodriguez v. Bowen*, 876 F.2d 759, 762 (9th  
17 Cir. 1989), *quoting Embrey v. Bowen*, 849 F.2d 418, 421 (9th Cir. 1988). The  
18 ALJ’s rejection of Dr. Everhart’s assessment based upon the cursory conclusion  
19 does not constitute a specific and legitimate reason upon which to reject the  
20 opinion.

21 Plaintiff also argued that the ALJ erred by giving less weight to Dr. Everhart  
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23 <sup>1</sup>When asked to incorporate Dr. Everhart’s moderate impairment ratings, the  
24 vocational expert testified, “Well, you would expect that the issue with supervisors  
25 may make it difficult for the individual to retain employment over time. A person  
26 who has difficulty with supervisors, or moderate limitations in interacting with  
27 supervisors, would likely have work background with a, a series of relatively short  
28 jobs, I believe.” Tr. 802.



1 and more weight to Dr. Moore's opinion because Dr. Moore "had the benefit of the  
2 entire medical record unlike Dr. Everhart." ECF No. 19 at 20. In the present  
3 opinion, the ALJ stated that he gave significant weight to the opinion from non-  
4 examining physician Margaret Moore, Ph.D., "because she had the benefit of the  
5 entire medical record, unlike Dr. Everhart and other acceptable medical source  
6 opinions." Tr. 458.

7 An examining physician's opinion is generally entitled to more weight than  
8 a non-examining physician's opinion. *Lester*, 81 F.3d at 830. "The contrary  
9 opinion of a non-examining medical expert does not alone constitute a specific,  
10 legitimate reason for rejecting a treating or examining physician's opinion."  
11 *Tonapetyan v. Halter*, 242 F.3d 1144, 1149 (9th Cir. 2001), citing *Magallanes*, 881  
12 F.2d at 752; see also *Pitzer v. Sullivan*, 908 F.2d 502, 506 n.4 (9th Cir. 199) ("The  
13 nonexamining physicians' conclusion, with nothing more, does not constitute  
14 substantial evidence, particularly in view of the conflicting observations, opinions,  
15 and conclusions of an examining physician.").

16 If the ALJ's proffered reason was valid, every non-examining provider's  
17 opinion that was obtained *after* an examining or treating physician opinion would  
18 be entitled to the greatest weight in a social security disability case. Yet under the  
19 regulations, non-examining physician opinions are generally entitled to less weight  
20 than treating and examining doctors. *See Lester*, 81 F.3d at 830 (treating  
21 physician's opinion should be accorded more weight than opinions of doctors who  
22 did not treat the claimant, and an examining physician's opinion is entitled to  
23 greater weight than a non-examining physician's opinion.).

24 As such, the fact that Dr. Moore, a nonexamining physician, possibly  
25 reviewed records that Dr. Everhart, an examining physician, did not review, is an  
26 invalid reason, standing alone, for rejecting Dr. Everhart's opinion. The errors in  
27 this case necessitate remand to reconsider the weight given to the medical  
28 opinions, and the ALJ should reconsider the appropriate weight to give to the



1 opinion from Dr. Everhart.

2 **B. Kayleem Islam-Zwart, Ph.D.**<sup>2</sup>

3 Plaintiff argues that the ALJ erred by rejecting the opinion of Dr. Islam-  
4 Zwart. ECF No. 28 at 3. Plaintiff contends that the ALJ erred by rejecting this  
5 opinion on the basis that the assessed GAF score was inconsistent with the  
6 limitations he described, and because Plaintiff's test results on the PAI indicated  
7 she exaggerated her complaints. ECF No. 28 at 3-4.

8 On May 20, 2005, Kayleem Islam-Zwart, Ph.D., examined Plaintiff and  
9 produced a narrative report dated May 23, 2005, and a Psychological/Psychiatric  
10 evaluation form. Tr. 188-95. The doctor administered several objective medical  
11 tests. Tr. 189-90. In the narrative report, Dr. Islam-Zwart noted that Plaintiff's  
12 PAI results reflected exaggerated complaints, and he added that such results are  
13 often associated with a cry for help or overly negative outlook on life. Tr. 190. He  
14 assigned a GAF of 55. Tr. 190. Dr. Islam-Zwart concluded that despite the  
15 chronic nature of Plaintiff's symptoms, "it is possible that she can achieve some  
16 degree of symptom control with appropriate treatment." Tr. 190.

17 In the form, Dr. Islam-Zwart assessed Plaintiff with one marked limitation in  
18 the ability to relate appropriately to co-workers and supervisors, and with four  
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20 <sup>2</sup>While Plaintiff contends in her opening brief that the ALJ erred by  
21 improperly rejecting the opinions of Dr. Islam-Zwart and Dr. Dalley, she did not  
22 provide related briefing or analysis until her reply brief. ECF No. 19 at 19; ECF  
23 No. 28. Ordinarily, the court will not review issues that are not adequately briefed  
24 in Plaintiff's opening brief. *See Carmickle v. Comm'r Soc. Sec. Admin.*, 533 F.3d  
25 1155, 1161 n.2 (9th Cir. 2008). In this case, the court will review the issues  
26 because the Government responded fully to these arguments, and thus will not  
27 suffer prejudice.  
28

1 moderate limitations in the abilities interact appropriately in public contacts,  
2 respond appropriately to and tolerate the pressures and expectations of a normal  
3 work setting, care for self, including personal hygiene and appearance, and control  
4 physical or motor movements and maintain appropriate behavior. Tr. 194.

5 The ALJ found, in the prior decision, the moderate to marked limitations  
6 assessed by Dr. Islam-Zwart were “not consistent with the [GAF] rating of 55” and  
7 the limitations did not result in total disability. Tr. 475. The ALJ also noted that  
8 the PAI reflected exaggerated complaints. Tr. 475.

9 First, an ALJ properly considers the inconsistency of conclusions with the  
10 physician's own findings in rejecting a physician's opinion. *Johnson v. Shalala*, 60  
11 F.3d 1428, 1432-33 (9th Cir. 1995); *Magallanes v. Bowen*, 881 F.2d 747, 751 (9th  
12 Cir. 1989); *Young v. Heckler*, 803 F.2d 963, 968 (9th Cir. 1986). The existence of  
13 an inconsistency between a doctor's findings and conclusions is a specific and  
14 legitimate reason for rejecting that opinion. *See Young*, 803 F.2d at 968 (treating  
15 doctor's conclusory opinion that claimant was disabled was properly rejected by  
16 ALJ when it was internally inconsistent and not consistent with doctor's prior  
17 medical reports).

18 The Global Assessment of Functioning ("GAF")<sup>3</sup> score is the clinician's  
19 judgment of the individual's overall level of functioning. See DIAGNOSTIC AND  
20 STATISTICAL MANUAL OF MENTAL DISORDERS, DSM-IV, 30-32 (4th ed. 1994).  
21 GAF scores of 31 to 40 represent some impairment in reality testing, or serious  
22 impairment in several areas such as work or school, family relations, judgment,  
23 thinking, or mood; GAF scores of 41 to 50 represent serious symptoms or  
24 impairment in social, occupational or school functioning; GAF scores of 51 to 60  
25 represent moderate symptoms or difficulty in those areas; and scores of 61 to 70  
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27 <sup>3</sup>The 2013 DSM–V dropped the use of the GAF. DIAGNOSTIC AND  
28 STATISTICAL MANUAL OF MENTAL DISORDERS, 16 (5th ed. 2013).

1 represent mild symptoms with a reasonably good level of functioning. *Id.* at 32.  
2 An ALJ has no obligation to credit or even consider GAF scores in the disability  
3 determination. *See Howard v. Comm'r of Soc. Sec.*, 276 F.3d 235, 241 (6th Cir.  
4 2002) ("While a GAF score may be of considerable help to the ALJ in formulating  
5 the RFC, it is not essential to the RFC's accuracy").

6 The Psychological/Psychiatric Evaluation form defined a moderate  
7 limitation as, "significant interference with basic work-related activities," and a  
8 marked limitation as "very significant interference with basic work-related  
9 activities." Tr. 192.

10 In this case, Dr. Islam-Zwart assessed Plaintiff's GAF score at 55, which  
11 indicates moderate impairments. Given the definition of a moderate GAF score  
12 between 51-60, as well as the definition of "marked," and "moderate" in the form,  
13 it is not clear that a person could never simultaneously have marked impairments  
14 and a moderate GAF score. Moreover, an ALJ is required to explain how this  
15 assessment is necessarily inconsistent with opining that the patient has "marked"  
16 and "moderate" impairments. *See Reddick*, 157 F.3d at 725. Additionally, when  
17 providing reasons for rejecting opinion evidence, an ALJ must provide "a detailed  
18 and thorough summary of the facts and conflicting clinical evidence, stating [his or  
19 her] interpretation thereof, and making findings." *Reddick*, 157 F.3d at 725.  
20 Finally, the ALJ must do more than merely state conclusions, but instead, "must  
21 set forth [his or her] own interpretations and explain why they, rather than the  
22 doctors', are correct." *Id.* (citing *Embrey v. Bowen*, 849 F.2d 418, 421-22 (9th Cir.  
23 1988)).

24 To the extent the ALJ rejected Dr. Islam-Zwart's opinion as incompatible  
25 with the GAF score, the ALJ failed to explain why a GAF score, a generalized  
26 assessment, superseded Dr. Islam-Zwart's more precise opinions as to Plaintiff's  
27 ability to work. As a global reference intended to aid in treatment, a GAF score  
28 does not itself necessarily reveal a particular type of limitation and is not an

1 assessment of a claimant's ability to work. Here the ALJ failed to explain how  
2 Plaintiff's "moderate" GAF score is inconsistent with Dr. Islam-Zwart's assessment  
3 that Plaintiff had one "marked" impairment in her ability to relate appropriately to  
4 co-workers and a supervisor, and multiple "moderate" impairments including the  
5 ability to interact with the public, respond appropriately to and tolerate the  
6 pressures and expectations of a normal work setting, care for herself including  
7 hygiene and appearance, and maintain appropriate behavior. Tr. 194.  
8 Under these circumstances, the ALJ erred by finding, without explaining, that Dr.  
9 Islam-Zwart's assessment was internally inconsistent.

10 Moreover, the ALJ relied upon Plaintiff's PAI test results that reflected  
11 "exaggerated complaints," as a basis for giving little weight to Dr. Islam-Zwart's  
12 findings. Tr. 475. Dr. Islam-Zwart interpreted Plaintiff's test results somewhat  
13 differently from the ALJ. Dr. Islam-Zwart explained that Plaintiff's profiled  
14 reflected exaggerated complaints that are often a cry for help or merely reflective  
15 of an overly negative outlook on life. Tr. 190. He indicated that she had decreased  
16 self-esteem and difficulty concentrating. Tr. 190.

17 An ALJ is not at liberty to substitute his own views for uncontroverted  
18 medical opinion. *See Nguyen v. Chater*, 172 F.3d 31, 35 (1st Cir.1999) ; *Balsamo*  
19 *v. Chater*, 142 F.3d 75, 81 (2nd Cir. 1998) (ALJ is free to choose between properly  
20 submitted medical opinions but is not free to set his own expertise against that of a  
21 physician); *Rohan v. Chater*, 98 F.3d 966, 970 (7th Cir.1996) (ALJ must not  
22 succumb to the temptation to play doctor and make independent medical findings).  
23 Thus, because the ALJ failed to provide an explanation of how the GAF score and  
24 the marked and moderate limitations are fatally inconsistent, and because the ALJ  
25 impermissibly substituted his own interpretation of Plaintiff's test results, Dr.  
26 Islam-Zwart's opinion must be reconsidered on remand. The ALJ failed to provide  
27 specific and legitimate reasons supported by substantial evidence for rejecting the  
28 opinions from Dr. Islam-Zwart.

1 **C. Mahlon Dalley, Ph.D.**

2 Plaintiff argued that the ALJ did not articulate a specific and legitimate  
3 reason for rejecting Dr. Dalley's opinions. ECF No. 28 at 2-3.

4 On October 15, 2004, Dr. Dalley adopted the findings and conclusions in a  
5 report prepared by Donald Crawford, MS, LMHC, after Mr. Crawford examined  
6 Plaintiff. Tr. 174. The report indicates that based upon observations, reported  
7 symptoms and Plaintiff's MMPI-2 profile, Plaintiff meets the criteria for diagnosis  
8 of major depressive disorder and personality disorder not otherwise specified. Tr.  
9 173. The report concluded that Plaintiff's symptoms were "likely to temporarily  
10 interfere with her ability to tolerate the pressures and expectations associated with  
11 a normal work environment." Tr. 174.

12 On March 14, 2005, Dr. Dalley adopted the findings and conclusions in a  
13 report prepared by Abigail Osborne, M.S. Tr. 183. The report concludes that  
14 based upon invalid MMPI-2 scores and low effort on the MACE, Plaintiff meets  
15 the criteria for malingering. Tr. 183. The report concluded, "[a]t this time, she  
16 does not appear to have a psychological disability that would prevent her from  
17 working." Tr. 183.

18 The ALJ gave little weight to Dr. Dalley's October, 2004, opinion because  
19 five months later Dr. Dalley opined that Plaintiff did not appear to have a  
20 psychological disability that would prevent her from working. Tr. 475. The ALJ  
21 added that the opinion was "supported by substantial test results" that indicated  
22 Plaintiff was malingering. Tr. 475. As noted above, the ALJ properly considers  
23 inconsistencies within a physician's findings in determining the weight to give the  
24 opinion. *Johnson*, 60 F.3d at 1432-33; *Magallanes*, 881 F.2d at 751; *Young*, 803  
25 F.2d at 968. In this case, the ALJ properly rejected Dr. Dalley's first opinion, in  
26 light of the subsequent examination, less than six months later, concluding that  
27 Plaintiff was not under any disability that would prevent her from working. The  
28 ALJ's reason for giving little weight to the first opinion was specific and legitimate

1 and supported by substantial evidence.

2 **D. Dennis R. Pollack, Ph.D.**

3 Finally, Plaintiff contends that the ALJ erred by improperly rejecting the  
4 opinion of Dr. Pollack on the basis that the report contained internal  
5 inconsistencies and was not supported by the record as a whole.<sup>4</sup> ECF No. 19 at  
6 20.

7 On February 20, 2008, Dr. Pollack examined Plaintiff, administered several  
8 objective tests, reviewed Plaintiff's medical records, and produced a narrative  
9 report and completed a Mental Medical Source Statement. Tr. 374-84. Dr. Pollack  
10 assessed Plaintiff with two marked limitations: in the ability to perform scheduled  
11 activities within a schedule, maintain regular attendance, and be punctual within  
12 customary tolerances, and in the ability to complete a normal workday and  
13 workweek without interruptions from psychologically based symptoms and to  
14 perform at a consistent pace without an unreasonable number and length of rest  
15 periods. Tr. 382. He also assessed Plaintiff with moderate limitations in her  
16 ability to accept instructions and respond appropriately to criticism from  
17 supervisors. Tr. 382. Dr. Pollack noted that Plaintiff's "attempts at malingering  
18 interfere with one developing a clear understanding of her problems." Tr. 379.

19 In the present decision, the ALJ addressed Dr. Pollack's opinion within the  
20 context of analyzing the vocational expert's opinion. Tr. 458. The ALJ rejected  
21 the vocational expert's opinion, in part, because she relied upon the opinion of Dr.  
22 Pollack. Tr. 458. The ALJ explained that Dr. Pollack's report was entitled to little  
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24 <sup>4</sup>Plaintiff also argued that the ALJ erred in giving little weight to Dr.  
25 Pollack's opinion on the basis that he relied largely on Plaintiff's self-report. ECF  
26 No. 19 at 20. However, the ALJ did not rely upon this reason for discounting Dr.  
27 Pollack's opinion, but instead used this reason for discounting the vocational  
28 expert testimony. Tr. 458.



1 weight because it was internally inconsistent. Tr. 458. Specifically, Dr. Pollack  
2 assigned a GAF of 55, indicating moderate symptoms, but also found Plaintiff had  
3 marked limitations. Tr. 458. Additionally, the ALJ found that “the objective  
4 record as a whole” did not support marked limitations. Tr. 458. The ALJ did not  
5 elaborate, explain or provide examples from the record.

6 In the April 8, 2010, opinion, the ALJ analyzed Dr. Pollack’s opinion and  
7 gave it “no weight” for three reasons: (1) it was inconsistent with the GAF  
8 assessment; (2) the “MMPI-2 results were not interpretable suggesting  
9 exaggeration of symptoms;” and (3) “[t]his psychologist always finds moderate or  
10 marked limitations within performing activities within a schedule, maintaining  
11 regular attendance, and being punctual ... and completing a normal workday... and  
12 performing at a consistent pace... which of course supports disability per  
13 vocational expert testimony in past hearings.” Tr. 476).

14 To the extent the ALJ rejected Dr. Pollack’s opinion as incompatible with  
15 the GAF scores, as explained above, the ALJ failed to explain how Plaintiff’s  
16 “moderate” GAF score is inconsistent with Dr. Pollack’s assessment that Plaintiff  
17 had two “marked” impairments in his ability to complete a full workweek. Tr. 382.  
18 Under these circumstances, the ALJ erred by finding, without explaining, that Dr.  
19 Pollack’s assessment was internally inconsistent.

20 The ALJ’s second reason for rejecting Dr. Pollack’s opinion is also flawed.  
21 Plaintiff also contends that the ALJ erred by providing a “boilerplate” statement  
22 that Dr. Pollack’s assessment that Plaintiff had marked impairments was not  
23 supported by the record as a whole. It is insufficient for an ALJ to reject the  
24 opinion of a treating physician by merely stating, without more, that it is  
25 inconsistent with other evidence in the record. *See Embrey v. Bowen*, 849 F.2d  
26 418, 421 (9th Cir. 1988). The ALJ provided additional discussion of Dr. Pollack’s  
27 opinion in the second decision, but neither discussion provides explanation,  
28 citation to the record, or meaningful analysis to support for the ALJ’s cursory



1 assertion. As analyzed *supra*, this was an invalid reason upon which to discount  
2 Dr. Pollack's opinion. See Tr. 458; 475-77.

3 The third reason the ALJ provided for rejecting Dr. Pollack's opinion was  
4 apparently based upon the ALJ's perceived bias against Dr. Pollack, and this error  
5 requires remand to a new ALJ. The ALJ plays a crucial role in the disability  
6 review process. *Miles v. Chater*, 84 F.3d 1397, 1401 (11th Cir. 1996). The  
7 Eleventh Circuit noted that the impartiality of the ALJ is critical to determinations  
8 of disability:

9 Not only is [an ALJ] duty-bound to develop a full and fair record, [the  
10 ALJ] must also carefully weigh the evidence, giving individualized  
11 consideration to each claim that comes before him [or her]. Because  
12 of the deferential standard of review applied to [the] decision-making,  
13 the ALJ's resolution will usually be the final word on a claimant's  
14 entitlement to benefits. The impartiality of the ALJ is thus integral to  
15 the integrity of the system. See *Johnson v. Mississippi*, 403 U.S. 212,  
16 216, 91 S. Ct. 1778, 1780, 29 L. Ed. 2d 423, 427 (1971) (citations  
omitted) ("Trial before "an unbiased judge is essential to due  
process.").

17 *Miles*, 84 F.3d at 1401. The facts presented in *Miles* are similar to those in this  
18 case. In *Miles*, the ALJ analyzed the medical opinion evidence and added that a  
19 physician expert "concluded (as he usually does) that she was totally disabled."  
20 *Miles*, 84 F.3d at n.4). The *Miles* court found that this comment from the ALJ,  
21 "without any evidence in support thereof, reflect that the process was  
22 compromised." *Id.* at 1401. The *Miles* court held that the Plaintiff was "entitled to  
23 an unbiased reconsideration of her application for benefits before a different ALJ."  
24 *Id.*; see also *Reed v. Massanari*, 270 F.3d 838, 844 (9th Cir. 2001)(remand to a  
25 new ALJ required after ALJ opined the two available specialists "are totally  
26 unreliable" because they conclude "everybody is disabled.").

27 In this case, without supporting evidence in the record, the ALJ rejected Dr.  
28 Pollack's opinion because the ALJ's personal belief that Dr. Pollack "always finds

1 moderate or marked limitations” in the categories related to working a full  
2 workweek. Tr. 476). As in *Miles*, the ALJ’s comment in this case reflects that the  
3 integrity of the process was compromised, and in the case at bar, Plaintiff is  
4 similarly entitled to an unbiased reconsideration of her application for benefits  
5 before a new ALJ. See 20 C.F.R. § 404.940 (providing as a remedy the holding of  
6 a new hearing before another ALJ); see also *Ventura v. Shalala*, 55 F.3d 900 (3d  
7 Cir. 1995).

### 8 CONCLUSION

9 Having reviewed the record and the ALJ's findings, this court concludes the  
10 ALJ's decision is not supported by substantial evidence and is based on legal error.  
11 On remand, the new ALJ should reconsider the proper weight to give to each  
12 medical opinion in the record. Accordingly,

#### 13 IT IS ORDERED:

14 1. Plaintiff’s Motion for Summary Judgment, **ECF No. 19**, is  
15 **GRANTED**.

16 2. Defendant’s Motion for Summary Judgment, **ECF No. 27**, is  
17 **DENIED**.

18 3. An application for attorney fees may be filed by separate motion. The  
19 District Court Executive is directed to file this Order and provide a copy to counsel  
20 for Plaintiff and Defendant. Judgment shall be entered for Plaintiff, and the file  
21 shall be CLOSED.

22 **IT IS SO ORDERED.** The District Court Executive is directed to file this  
23 Order, provide copies to the parties, enter judgment in favor of defendant, and  
24 **CLOSE** this file.

25 DATED May 12, 2014.



A handwritten signature in black ink, appearing to read "M", is written over a horizontal line.

JOHN T. RODGERS  
UNITED STATES MAGISTRATE JUDGE